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**IN THE
COURT OF APPEALS OF INDIANA**

OMAR G. BURTON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 03A01-0610-CR-418
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause Nos. 03D01-9602-CF-123, 03D01-9605CF-452, 03D01-9605-CF-456

April 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Omar G. Burton appeals the denial of his petition for permission to file a belated notice of appeal. We affirm.

Issue

Burton raises one issue, which we restate as whether the trial court erred in denying his petition for permission to file a belated notice of appeal.

Facts and Procedural History

On September 23, 1996, pursuant to a plea agreement, Burton pled guilty to class C felony battery in cause number 03D01-9602-CF-123, class B felony burglary in cause number 03D01-9605-CF-452, and class D felony theft in cause number 03D01-9605-CF-456. The plea agreement left sentencing to the discretion of the trial court. At the change of plea hearing, the trial court explained to Burton that, by pleading guilty, Burton was giving up the right to appeal his convictions. Appellant's App. at 31. The trial court also informed him that he had a right to file a petition for post-conviction relief if there were a reason his guilty pleas should be set aside. *Id.* at 32. On October 15, 1996, the trial court accepted Burton's guilty pleas and sentenced him.

On July 6, 2005, Burton filed a motion for modification of sentence, which was denied without hearing on August 2, 2005. On November 17, 2005, Burton filed a motion to correct erroneous sentence, which the trial court denied without hearing on November 28, 2005. The trial court's order included the following: "The remedy for challenging a sentence is to appeal the sentences themselves. The time for such appeal has expired." *Id.* at 4-5, 12, 19.

On February 6, 2006, Burton, pro se, filed a petition for permission to file a belated

notice of appeal pursuant to Indiana Post-Conviction Rule 2(1). On August 10, 2006, the trial court denied the petition without a hearing. Burton appeals.

Discussion and Decision

Burton challenges the trial court's denial of his petition for permission to file a belated notice of appeal. Indiana Post-Conviction Rule 2(1) provides in part:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

(a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and

(b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

As the petitioner seeking the belated appeal, Burton bore the burden of proving his grounds by a preponderance of the evidence. *Salazar v. State*, 854 N.E.2d 1180, 1184 (Ind. Ct. App. 2006). Here, the trial court did not conduct a hearing on Burton's petition. In these circumstances, we review a trial court's decision regarding the petition de novo. *Perry v. State*, 845 N.E.2d 1093, 1095 (Ind. Ct. App. 2006), *trans. denied*. In determining whether a defendant was without fault in the delay of filing a notice of appeal, the relevant factors include the defendant's level of awareness of his or her procedural remedy, age, education, familiarity with the legal system, whether he or she was informed of his or her appellate rights, and whether he or she committed an act or omission that contributed to the delay. *Id.*

Burton claims that he was not at fault in failing to file a timely notice of appeal because neither the trial court nor his defense counsel informed him that he could appeal his sentences. He claims that he was unaware of the proper procedure for challenging his

sentences until he learned of *Collins v. State*, in which our supreme court held that “the proper procedure for an individual who has plead guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to file an appeal under [Post-Conviction Rule 2].” 817 N.E.2d 230, 233 (Ind. 2004). Subsequent to *Collins*, we have held that a defendant was not at fault in failing to file a timely notice of appeal where the trial court did not advise the defendant of his right to appeal his sentence and the defendant was not otherwise informed of this right.¹ See *Perry*, 845 N.E.2d at 1096 (concluding that, where neither trial court nor plea agreement advised defendant of right to appeal sentence, failure to file a timely notice of appeal was not due to defendant’s fault); *Baysinger v. State*, 835 N.E.2d 223, 226 (Ind. Ct. App. 2005) (concluding that defendant was not at fault where trial court and trial counsel failed to inform him of his right to appeal his sentence). However, with regard to diligence in requesting permission to file a belated notice of appeal, *Perry* and *Baysinger* are distinguishable from the case at bar.

In *Baysinger*, the defendant was sentenced on January 23, 2001. Baysinger learned of his right to appeal his sentences by means of Post-Conviction Rule 2(1) in *Collins*, which was decided November 9, 2004. Baysinger filed his petition for permission to file belated appeal on March 1, 2005, approximately four months after *Collins* was decided.

In *Perry*, the defendant was sentenced on July 24, 1997. On July 14, 2000, he filed a

¹ In arguing that Burton failed to show that he was not at fault, the State asserts that Burton “was represented by counsel for several months prior to seeking the belated appeal.” Appellee’s Br. at 7-8. The record does not support this assertion. While the trial court appointed a state public defender to represent Burton on February 28, 2006, the Office of the State Public Defender quickly moved for relief from appointment on the ground that Burton’s petition was clearly brought pursuant to Post-Conviction Rule 2 rather than Post-Conviction Rule 1, and therefore a state public defender was not authorized to represent Burton. Appellant’s App. at 19, 52. Thus, Burton did not have the benefit of counsel.

petition for post-conviction relief, alleging, *inter alia*, that the trial court abused its discretion in sentencing him. On May 1, 2001, the trial court granted Perry permission to withdraw his petition without prejudice. Like Baysinger, Perry learned of his right to appeal his sentence by means of Post-Conviction Rule 2(1) when he read *Collins*. Perry filed a petition for leave to file a belated notice of appeal on June 28, 2005. While noting that Perry filed his petition for permission to file belated appeal approximately seven months after *Collins* was decided, which was slightly longer than the time period in *Baysinger*, we found it was sufficient evidence of diligence on Perry's part. *See also Salazar*, 854 N.E.2d at 1187 (concluding defendant was diligent where he filed pro se motion for permission to file a belated appeal on January 27, 2005); *Cruite v. State*, 853 N.E.2d 487, 490-91 (Ind. Ct. App. 2006) (concluding defendant was diligent where the State Public Defender filed motion to dismiss petition for post-conviction relief and to appoint local counsel to pursue a belated appeal on February 14, 2005), *trans. denied*.

Here, as of the time *Collins* was handed down on November 9, 2004, Burton had not made *any* attempt to challenge his sentences eight years after his 1996 sentencing. His petition for permission to file belated notice of appeal was filed on February 6, 2006, fifteen months after *Collins*. Accordingly, we conclude that Burton has not carried his burden of establishing that he was diligent in requesting permission to file a belated notice of appeal. The trial court, therefore, did not err in denying his petition.

Affirmed.

SULLIVAN, J., and SHARPNACK, J., concur.

